IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 662 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
And
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GANESHBHAI DEVIDAS BINDU - Appellant
Versus
STATE OF GUJARAT - Respondent

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Appearance :
Ms. SEJALBEN VYAS For MR PM VYAS for Appellant:
MR. A.J. DESAI, LD. ASTT. PUBLIC PROSECUTOR for Respondent :

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 03/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. By present appeal the appellant challenges the judgment & order rendered by Learned Additional Sessions Judge, Valsad in Sessions Case No. 113 of 1995 on 6th May, 1997. The appellant came to be convicted for the offence punishable under Section 396 of Indian Penal Code and was ordered to undergo R.I., for life and to pay a fine of Rs.5,000=00, in default of which, to undergo simple imprisonment for a period of one year. The accused was given benefit of set off for the period he was in prison as an under trial prisoner.

2. The incident occurred on 4th June 1995 around 3.00 'O' clock in the Manibaug Society at Abrama. As per the prosecution case, the appellant accompanied by about 11 persons committed dacoity in the house situated on Plot No. 141 in the Manibaug Society at village Abrama. The house is owned and/or occupied by Babubhai Chhaganbhai Dhodiya Patel. In the course of transaction of commission of dacoity injuries were caused to Ranjanben Babubhai and Babubhai Chhaganbhai. The injuries caused to Ranjanben resulted into her death. The assailants fled away from the place with booty consisting of Rs.18,000=00 cash and ornaments of gold & silver worth Rs.35,000=00. On the victims raising shouts a

neighbour, Dr. Ajitbhai Omkarbhai, rushed to the spot and saw the injured persons. The injured persons were taken to hospital and FIR was lodged. On the basis of the FIR offence was registered and investigation started.

2.1 On the other hand the appellant was apprehended by Kamleshbhai Iswarbhai from a wadi of Mohanbhai Mansukhbhai Patel situated at Parnera because of his suspicious behaviour. When the appellant was apprehended, he had in his pocket a bag containing the property looted in the dacoity. The said property came to be identified by the victims later on. The appellant came to be identified by the victims.

2.2 The Investigating Officer having found sufficient material against the appellant and two other persons filed charge sheet against them in the Court of JMFC, Valsad. As the offence with which the accused persons were charged were triable exclusively by the Court of Sessions, the case came to be committed to the Court of Sessions and numbered as such. Learned Additional Sessions Judge framed the charge at exhibit-3. The accused persons pleaded not guilty to the charge and

came to be tried.

2.3 After considering the evidence produced by the prosecution, learned Additional Sessions Judge found that the prosecution was successful in establishing charges against the appellant and recorded the conviction as stated above. Learned Judge, however, came to the conclusion that the charges against rest of the accused persons were not established and recorded their acquittal. The appellant has, therefore, preferred this appeal.

3. Learned advocate Ms. Vyas for the appellant has taken us through the record & proceedings. Her contention is that the trial court has come to a conclusion that Test Identification Parade is not properly conducted. If that be so, and if the trial court gave benefit to the other accused, the trial court has committed an error in not giving the benefit to the appellant. The only evidence against the appellant is that the appellant was caught from the wadi by P.W-13 Kamleshbhai and that the ornaments are found from him. But the panch witnesses in whose presence the appellant was arrested and or ornaments

are recovered have not supported the prosecution case and therefore, the chain of circumstances is not established properly. She, therefore, submitted that the appeal may be allowed and the order of conviction may be set aside.

4. Learned APP Mr. Desai has opposed this appeal. According to Mr. Desai, it is true that the Test Identification Parade is found to be not reliable by the trial court but the appellant has been caught in near vicinity of time & place of the incident with the looted property. The property has been recovered from him in presence of panch witnesses. Though initially the panch witnesses have not supported the prosecution version, during cross examination to the prosecutor, they have fully supported the prosecution case. The looted property has been identified by the victims. The appellant is not from the area where the incident had occurred and his presence at the place from where he was apprehended is unnatural and unexplained and therefore, the trial court has rightly recorded the conviction. The appeal may therefore be dismissed.

5. We have examined the record & proceedings from the

angles suggested by rival sides.

6. In the FIR name of the miscreants have not been given. There is no dispute on the aspect that Ranjanben was injured in the incident and succumbed to the injuries . The incident occurred on 4th June 1995 at about 3.30 hrs and within hours thereafter the appellant came to be apprehended by P.W-13 Kamleshbhai (Exh.39) at about 8.00 hrs along with the looted booty. His arrest panchnama was drawn in presence of P.W-2 Sanjay Mangubhai and P.W-3 Vikrambhai Chhibubhai. Both these witnesses have initially not supported the prosecution case. However, with the permission of the court, the prosecution was permitted to cross examine the witnesses and both of them have during cross examination wholeheartedly supported the prosecution case. It is also worthily to note that P.W-3 Vikrambhai Chhibubhai (Exh.16) in his cross examination in terms says that the looted property was with the person apprehended in a bag which consisted Rs.18,000=00 cash and other ornaments like bangles, chain, ear-rings etc. Although he initially identified another accused as the person apprehended, he later on admitted that it was the appellant who was apprehended. These two witnesses

have been cross examined by the defence and during cross examination Vikrambhai Chhibubhai states that he went to the spot on learning about the thief having been caught. He denies the suggestion that he had signed a prepared panchnama. He says that the panchanama was prepared on the spot. He also states that the police reached the spot subsequent to his reaching the spot. He denies the suggestion that the police handed over the bag to the apprehended person and then said that this bag was found from him.

6.1 It is thus clear that though initially the witnesses did not support the prosecution case, during cross examination to the prosecutor they have supported the prosecution case and the cross examination to the defence advocate has revealed material which confirms the prosecution version.

7. The factum of incident is established by the prosecution through deposition of first informant P.W-7 Babubhai Chhaganbhai, P.W-4 Dr. Ajitbhai Omkarbhai and P.W-5 Niruben Fuljibhai and therefore there can not be any doubt whether th incident had occurred or not.

8. A test identification parade was conducted in presence of panch witness by the Executive Magistrate. The Executive Magistrate has been examined at exhibit-35 and the panch witness Rameshbhai Gosaibhai at exh. 38. It emerges from the deposition that requisite care was not taken by the Executive Magistrate to see that there is no opportunity for the witness to notice the arrestees. Learned trial Judge, therefore, came to the conclusion that no credence can be given to the evidence in form of test identification parade. In our opinion his conclusion was correct.

9. Apart from T.I. Parade, the evidence against the appellant is that the appellant was apprehended in the vicinity of time & place with looted property.

9.1 It was indicated that the first informant has improved the version by saying that he had known appellant prior to the incident and had identified the appellant at the time of the incident. The first informant has stated in his deposition that he had known the appellant because earlier appellant had approached the first informant to collect donation. It was therefore argued that the witness was not telling

the truth. Had he really identified the appellant at the time of occurrence, and had he known the appellant, he would have named the appellant in the FIR, which he has not done. This witness therefore improves upon the prosecution case only to connect the appellant with the crime it is canvassed.

9.2 We have given a thoughtful consideration to the situation. It is true that the first informant has improved his case but whether that really goes to the root of the matter, and whether that really abrogates the effect or impact of other evidence and circumstances against the appellant is the real question to be examined. It can not be over looked that the witnesses tend to add some embroidery in an attempt to lend more credence to their version out of enthusiasm or out of fear of being disbelieved or being labelled as a false witness. In this regard the observations made by the Apex Court in STATE OF U.P. Vs. ANIL SINGH, AIR 1988, S.C. pg. 1998 can be profitably referred to. Paragraph no. 15 reads thus :-

> " 15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that

is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should bot be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. “

9.3. With the above settled proposition, if the case against the appellant is seen, the circumstances of his being apprehended with the lotted goods in near vicinity of time & place is so strong and overwhelming that even if the first imformant's improved version is ignored, the case against the appellant would stand established. The looted property stands identified by the victims and as discussed above there is no reason for not believing the version emerging from the prosecution witnesses. The case against the appellant stands thus established by circumstances rather than oral evidence.

10.We may not forget to mention one more circumstance namely that the appellant had sustained injury in the transaction which has been properly established by examining Medical Officer, who had treated him. So also by the deposition of panch witnesses who said that they had noticed injuries on person of the appellant.

11. It also emerges from medical evidence of Dr. Ajitbhai Omkarbhai (P.W-4) that important veins of the deceased were cut and she died out of hyponolumic shock due to profuse bleeding. In cross-examination he states that in about half an hour the death would ensue. The injury was therefore sufficient in ordinary course of nature to cause death.

11.1. Involvement of the accused in the incident thus stands established. It also stands established that the accused was in company of more than five persons, though not identified. It also stands established that Ranjanben was done to death and hurt was caused to witnesses Niruben and Babubhai Chhaganbhai in

conjoint action of accused and his accomplice. Each of such persons is said to commit dacoity with murder. The trial court was, therefore, right in recording conviction under Section 396 of I.P.C.

12. We have gone through the judgment & order of the trial court and find no error committed in appreciation of the evidence. We are in agreement with the reasoning adopted and conclusion arrived at by the learned Judge. We find no merit in the appeal. Appeal must fail and stands dismissed. The judgment & order impugned herein stands confirmed.

[A.L. DAVE, J]

[S.R. BRAHMBHATT, J]

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